
U.S. Department of Labor
Office of Administrative Law Judges
1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 84-ERA-31

In the Matter of:

WILLIAM O'BRIEN
Complainant

v.

STONE & WEBSTER ENGINEERING CORP.
Respondent

P. Michael Shanely, Esq.
For Complainant

Walter E. Graham, Esq.
For Respondent

Before: STUART A. LEVIN
Administrative Law Judge

RECOMMENDED
DECISION AND ORDER

This proceeding arises under the Energy Reorganization Act of 1974, as amended 42 U.S.C. § 5851, (hereinafter referred to as

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the ERA or Act) and the regulations promulgated and published at 29 CFR Part 24 to implement the Act. On June 8, 1984, William O'Brien filed a complaint with the Department of Labor alleging that he was harassed, intimidated, and subjected to discrimination by Stone & Webster at the Nine Mile Point Nuclear Power Plant, Unit II

construction site at Oswego, New York. Mr. O'Brien was discharged several days after he filed the complaint.[1]

Following an investigation, the Area Director, Employment Standards Administration, U.S. Department of Labor, determined that the charges of harassment and intimidation were not timely filed and that discrimination under the Act did not occur. Mr. O'Brien requested a formal hearing which convened in Syracuse, New York on December 17 and 18, 1984.[2]

At the hearing, the parties were afforded a full opportunity to present evidence and argument. The findings and conclusions which follow are based upon my observation of the appearance and demeanor of the witnesses who testified at the hearing, and upon an analysis of the entire record in light of the arguments presented, the regulations, statutory provisions, and applicable case law.

Findings of Fact

1. William O'Brien, at times here relevant, was employed as a Level 2 Nuclear Inspector, Electrical, by Butler Services Corporation of Braintree, Massachusetts. He was paid $17 per hour and time and a half for overtime. Tr. 18,70. O'Brien is, what is known in the trade as a "job shopper," an individual experienced in an aspect of nuclear power plant construction who provides his services, upon assignment from his employer, to the highest bidder. At the request and subsequent approval of Stone & Webster Engineering Corporation, the construction contractor at Niagara Mohawk's Nine Mile II nuclear power plant, Butler Services assigned O'Brien to Stone & Webster in mid-March 1984, as an electrical inspector. Tr.8, 16-18, 21.

2. To facilitate further review of this matter and for ease of reference, the following individuals appeared as witnesses in this proceeding:

Nuclear Regulatory Commission

Robert Graham - NRC Senior Resident Inspector

Quality Control Witnesses

Lance Terry - Project Quality Assurance Manager
T. Tracy Arrington - Superintendent Field Quality Control
Donald Hall - Senior Field Quality Control Engineer
James Beverage - Electrical Inspection Supervisor
George Gignon - Lead Inspector
Michael LaPoint - Lead Inspector
William O'Brien - Level II Inspector
Charles Beckham - Level I Inspector

Electrical Engineering Witnesses

Thomas Landry - Principal Electrical Engineer
Mark Leyo - Electrical Field Engineer

3. Upon his arrival at the Nine Mile II site, O'Brien received a brief period of training from George Gignon, a lead inspector for Stone & Webster, Tr.21-22, and was certified as a Level 2, Electrical Termination, Quality Control Nuclear Inspector. Tr. 20, 79. Within a few weeks of his arrival, O'Brien was assigned the task, among his other duties, of training new inspectors who had arrived on the site. Tr.22-24.

4. On April 27, 1984, O'Brien was inspecting a cable termination installation by L.K. Comstock Co., the electrical sub-contractor at Nine Mile II. He noticed a workman welding a connection between what appeared to be aluminum and tin-plated copper. Tr.25. O'Brien thought this might be a problem because the use of dissimilar metals in a connection can produce a thermal condition which may result in a disconnection when in use. Tr. 25-26. He immediately contacted the foreman of the work crew who stopped work on the connection. Tr.26. L.K. Comstock management personnel were called to the site to inspect the metals, and, subsequently, Mark Leyo, a Stone & Webster electrical engineer, was asked to inspect the metals. Tr.26.

5. Leyo advised O'Brien that the connection did not involve dissimilar metals. Tr.27. O'Brien, then, produced a criteria print, 11Z2, which showed that approximately 30 similar connections were to be installed at Nine Mile II and that several had

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already been installed. He requested Leyo to research the materials being used and report back within 24 hours. Tr. 27. L.K. Comstock, in the meantime, had corrected the problem on the job which O'Brien had initially observed. Tr.28.

6. On April 28, 1984, Leyo failed to report back to O'Brien. Tr. 29. By then, however, O'Brien had obtained vendor specifications EO 11T which established that the connection he questioned the day before, and several others, involved the use of dissimilar metals. Tr. 29, 37-38.

7. On April 28, 1984, Earl Hall, a Stone & Webster Senior Field Quality Control Engineer, upon learning that Mark Leyo had not reported back to O'Brien, set up a meeting with Leyo. Tr. 30. At the meeting, Leyo initially denied that dissimilar metals were being used, but acknowledged, after reviewing vendor specifications, that perhaps some may have been used. Leyo agreed to research the question. Tr. 35-36.

8. As a result of the meeting with Leyo on April 28, Hall requested a meeting with Leyo's supervisor. On May 3, 1984, the day of the meeting, Hall advised O'Brien that they would not be meeting with Leyo's supervisor, but would, instead, be meeting with Tom Landry, Stone & Webster's on-site Principal Electrical Engineer. Tr. 39. Landry had been told that someone from Field Quality Control had been "ranting and raving" at Leyo, and Landry decided he wanted to discuss the matter with Hall. Tr. 270. It must be noted that no witness who participated in or observed O'Brien's contacts with Leyo,

including Leyo, described any of O'Brien's communications as "ranting and raving" or anything other than the expression of legitimate concern.

9. The meeting on May 3, 1984, was attended by O'Brien, Landry, Hall, Jim Beverage, an Electrical Inspection Supervisor, Michael LaPoint, a lead inspector, and Leyo. What transpired at this meeting is vigorously disputed. O'Brien contends that Landry challenged his experience and credentials and questioned his right to work at the site. O'Brien considered Landry's questions, tone, and demeanor , especially in light of the high level position he occupied, a form of harassment and intimidation for pursuing the dissimilar metals question. Tr.42-45, 47-48.

Landry denied that he questioned O'Brien's credentials, threatened or intimidated him. He described the meeting as

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"somewhat restrained" with "tense moments." Tr. 276-77. Others who attended the meeting allowed that it 'wasn't a completely calm meeting" (Leyo Tr. 256), a "slightly heated," meeting with "not an extreme amount of shouting." (LaPoint, Tr. 231, 232), and Hall could recall that Landry did ask if O'Brien was "a certified inspector." Tr. 340. More specifically, however, Beverage (Tr.288-89), La Pointe (Tr. 232-33), and Leyo (Tr.256) could not recall any challenge to O'Brien's competence.

Charges in O'Brien's complaint relating to a separate violation of the ERA based upon this incident are, in any event, time barred as determined by the Area Director.

10. On May 10, 1984, O'Brien presented a complaint to the on-site representative of the Nuclear Regulatory Commission alleging that he was harassed by Landry, that dissimilar metals were improperly being used, that an on-going production push was adversely affecting quality control inspections, and that he was in jeopardy of being fired. Tr. 47-48, 207-08.

11. On May 11, 1984, O'Brien received a reprimand from Beverage for allegedly leaving an inspection involving the installation of a transformer. Tr. 48-51. O'Brien had received an assignment from George Gignon to conduct a meggering test on the transformer. O'Brien conducted the test and left the site. An L.K. Comstock foreman, however, continued to install the transformer and apparently wrote in on his copy of the meggering test report that O'Brien had observed the installation. Comstock personnel then complained to Hall and Beverage that O'Brien had acted in an unprofessional manner.

Hall and Beverage met with Comstock personnel, and upon their return, Beverage issued the reprimand. When Gignon explained that O'Brien was not assigned the task of inspecting the installation, Beverage withdrew the reprimand. Tr. 47-49, 52, 91, 106-110, 289-90, 306-08, 321-22, 353-5, 382. Although Hall and Beverage denied that O'Brien

had received a reprimand, and Gignon could not recall Beverage reprimanding O'Brien, (Tr. 382), Hall did recall that O'Brien had mentioned to him on May 11, that Beverage "chewed him out" about the Comstock complaint. Tr. 353-54.

12. On the afternoon of May 11, 1984, Robert Graham, Senior Resident Inspector, NRC at Nine Mile II, scheduled a meeting in

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the office of Niagara Mohawk's Quality Assurance Manager to discuss the O'Brien complaint he had received the previous day. The meeting was attended by Inspector Graham, O'Brien, Lance Terry, Stone & Webster's Project Quality Assurance Manager, Earl Hall, Larry Dick, representing Niagara Mohawk, Brian Morrison, a Quality Assurance Engineering Manager and Bill Bateman, an NRC inspector. At the meeting, O'Brien reiterated his concerns. Stone & Webster agreed that O'Brien correctly challenged the use of dissimilar metals, Tr.211, and further committed to investigate several of O'Brien's other allegations, including the allegation, that L.K. Comstock personnel falsified the inspection report regarding the installation of a transformer. Tr. 209-210.[3]

13. Stone & Webster did not investigate O'Brien's allegation of harassment. It was Lance Terry's view following the meeting that harassment probably did not occur. Tr. 123-33. The NRC, however, initiated two formal investigations, the first to inquire into the use of dissimilar metals, and the second, by the NRC's Department of Investigations, to explore O'Brien's harassment charge. Tr. 214,220. Neither investigation has been completed as of this time.

14. Although Stone & Webster personnel had, following the meeting on may 11, determined not to pursue O'Brien's concern about harassment (Tr. 132-33), the NRC was led to believe otherwise. Robert Graham, the NRC's Resident Inspector testified that, at subsequent meetings, "There was an indication that Mr. Landry had been reprimanded as a result of the communications he had with Mr. O'Brien prior to the (sic) May 11th." Tr. 212. In fact, Landry did not receive a reprimand. Tr. 277-79, 422.

15. On May 31, 1984, T. Tracy Arrington, Superintendent of Field Quality Control, in effect, revoked O'Brien's certification to conduct field inspections. Tr. 409. O'Brien's supervisor, Jim Beverage, advised O'Brien that his hours were being cut back, Tr. 292, and he was given an office job. Tr. 410.

16. The commitment made to the NRC to investigate O'Brien's charges provided an opportunity to investigate O'Brien himself. *See,* Tr. 416-17. In the weeks following the first NRC meeting, Stone & Webster concluded that O'Brien had (1) "... left QA Category 1 cable terminations and connections that required 100%

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FQC witnesses (2) "failed to document unsatisfactory conditions," and (3) "documented inspections as being satisfactory when they were actually unsatisfactory conditions corrected immediately." Cx3.

17. On June 14, 1984, Stone & Webster, in effect, terminated O'Brien's employment at Nine Mile II by recommending his recall to Butler Services, Inc. Cx3. Stone & Webster alleged three grounds for this action:

a. 100% Witnessing Requirement

Stone & Webster was informed that, on May 31, 1984, O'Brien left the site of a cable termination, and, therefore, failed to witness 100% of the cable termination process. Upon O'Brien's departure, personnel from the electrical contractor at Nine Mile II, L.K. Comstock, complained about O'Brien's absence to Donald Hall, Stone & Webster's Senior Field Quality Control Engineer. Tr. 343.

The record shows that O'Brien was given an assignment to inspect a QA Category 1, safety related "L" service, *i.e*. 600 volt, power cable. Cx2, Tr. 81, 280. When he arrived on site, the workers were set up to begin the installation, but were delayed by a welding operation overhead. O'Brien took advantage of the work stoppage to make a phone call to Butler Services to inquire why his paycheck had not arrived. He was gone 15-20 minutes, and had "stamped out" before departing. Tr. 81-84. By the time O'Brien returned, work had commenced, and the cable had been readied for the next step in the termination. Tr. 82.

In the meantime, following the call from L.K. Comstock, George Gignon was sent out to the site to continue the cable termination inspection in O'Brien's absence. Tr. 377. Although Gignon had not witnessed some of termination work which had been performed before his arrival, he was able to verify the work that had been done, and he allowed the work to continue. Tr. 376-77, 429-433.

At a subsequent meeting on May 31, 1984, regarding this incident, O'Brien acknowledged he did not understand that Field Quality Control Standards required 100% witnessing of terminations. He understood these standards to require only witnessing of specified hold points. He further acknowledged

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that he had in the past witnessed termination hold points, but not necessarily the entire termination process.

With respect to the witnessing requirement, Stone & Webster site Quality, Standards E061A Section I Rev. 8, as Amended March 2, 1984 by E&DCR 1424 (Jxl, Rx7)[4] provide, in part, as follows:

> 1.15.2 QA Category I cable pulls shall not proceed until Field Quality Control personnel are present.
> 1.15.4 Mandatory hold points for which prior notification is required will be established by the Engineers. Mandatory hold points are considered to be those tests, inspections, and operations which require "witnessing" by Field Quality Control personnel and beyond which the work shall not proceed without written consent of the Engineers.

Mandatory hold points are identified below:

> 1. Concealed items as specified in paragraph 1. 13. 4
> 2. Raceway installation prior to cable pull (QA Category I only)
> 3. Cable pulls as specified in paragraph 1. 15. 2
> 4a. Termination and connection process of all QA Category-I J,H, L level power cables and K level power cables having closed barrel lugs. (As amended by Rev. 8, March 2, 1984).
> b. Other safety related (QA Categroy-I) cables, jumpers and internal wiring involving heat shrinks or tapes, after completion of termination and connection process but prior to application of heat shrinks or tapes.
> 5. High potential testing QA Cat I only.
> 6. Insulation resistance testing (meggering) of QA Category I cables, and equipment when meggering is required (only the initial megger after receiving onsite and the initial megger.

Similarly, Quality Standards QS 10.53NM provides in part as follows:

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> 4.1 Definitions
> 4.1.1 Termination - The process when the conductor ends are prepared, trained, and fitted with a terminal device such as a lug.
> 4.1.2. Connection - The process of attaching a terminated conductor to equipment terminals.
> 7.3 Cable Terminations and Connections
> 7.3.1 FQC shall witness the termination and connection process on all safety-related (QA Category I) J, H, and L level power cables and K power cables having closed barrel lugs. Other safety-related cables, jumpers, and internal wiring will be inspected by FQC after completion of the termination and connection process.

Following the incident on May 31, Donald Hall conducted an informal survey of twelve electrical inspectors. Each inspector was asked four questions, including whether it was permissible to leave a power cable termination while work was in progress, and

which services required witnessing. In a memorandum dated June 1, 1984, Hall reported generally that the "inspectors knew the requirements," although the specific answers to the questions were not noted. At the hearing, however, Hall testified that each inspector said that it was impermissible to leave the site of a power cable termination at any time, and although the particular services referred to in the survey question were not identified, Hall testified that each inspector stated that 100% witnessing was required. Tr. 338.

Nothwithstanding the Hall survey results, however, the record in this proceeding demonstrates that various Stone & Webster personnel interpret these standards differently. George Gignon, a lead inspector, for example, testified that all QA Category I J, H, and L power cable terminations must be 100% witnessed. He was, however, able on May 31, 1984, to verify work on an "L" cable termination he had not witnessed with no apparent violation of the Quality Standards. Tr. 376-77, *See also* Tr. 431-32. Similarly, Michael LaPoint, a lead inspector and participant in the Hall Survey, testified that it is his practice to witness 100% of Category 1 terminations. He emphasized, however, that certain check points or hold points must be

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witnessed whereas certain procedures such as bending the cable to the proper radius, and cable preparation, such as pulling off insulation, and stripping it back, for example, can be verified if not actually witnessed. Tr. 244, 239-40. These explanations were consistent with Tracy Arrington's understanding that there may be certain steps that may be verified if not witnessed. Tr. 431-32.

The record further shows that O'Brien had been assigned to inspect multiple cable terminations simultaneously. Tr. 67, 373-74. On one occasion, George Gignon assigned O'Brien to inspect terminations in different cubicles eight to ten feet apart. Tr. 373-74. O'Brien explained that it was impossible to provide 100% witnessing of simultaneous terminations if witnessing were interpreted as requiring 100% observation from start to finish. Tr. 67. And, Jim Beverage, the electrical inspection supervisor, acknowledged that he was unaware that inspectors were assigned two terminations at once. Although he visualized the impossibility of inspecting terminations in two different buildings, Beverage's concern, that multiple terminations may be inconsistent with a procedure which requires the inspector to watch each termination 100% of the time, applies equally to terminations taking place ten feet apart. Tr. 295. *Contra,* Terry, Tr. 151-52. It should here be noted that none of the Hall survey respondents were asked if they had ever been assigned simultaneous, multiple terminations. Rx3.

b. Failure to Document Unsatisfactory Conditions

As previously mentioned, Stone & Webster agreed, at the May 11, meeting with the NRC, to investigate the concerns O'Brien bad previously communicated to the NRC's Resident Inspector. As a "follow-up" on that investigation, Stone & Webster found, and by memorandum dated June 12, 1984, Mr. Hall reported, an incident which occurred on

May 4, 1984, involving a inspection O'Brien had conducted. Tr.347-48. On May 4, O'Brien had noted unsatisfactory conditions on a QA Category 1 cable termination. The unsatisfactory conditions were recorded on his work copy of a Conductor Termination Sheet for job #12177.00, cable 2SWPDYC 301 and cable 2SWPFYC 301. Rx4.

The record shows that there are several copies of the termination ticket for each job, and inspectors routinely take a work copy of the ticket into the field for the purpose of

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recording their findings. Upon returning to their office, they are then expected to prepare an Inspection Report documenting the unsatisfactory conditions they observed. The record shows that O'Brien did not write an Inspection Report for the unsatisfactory conditions he noted on May 4.

Shortly after the inspection on May 4, the construction crew requested George Gignon, O'Brien's lead inspector, to return the termination tickets on jobs O'Brien had inspected, and Gignon complied. Rx4. O'Brien contended that Gignon took his work copy of the termination ticket and returned it to construction, thereby making it impossible for him to complete an Inspection Report. Tr. 89. Gignon denied returning O'Brien's work copy, and testified that he returned the Master Ticket which contained none of O'Brien's findings. Tr. 378-79.

Based upon a careful consideration of the credibility of the witnesses, the documents in evidence, and the circumstances under which this incident occurred, I find that Gignon did, in fact, return O'Brien's work copy of the termination ticket to construction.

1. Each termination ticket consists of a Master Ticket and several copies. Tr. 349, 379-80. One copy of the ticket is routinely provided to the construction crew assigned to perform the work called for on the ticket. Tr.349. On May 4, the day the work was performed, it may reasonably be inferred that the construction crew had in its possession a copy of the tickets for the jobs on which they were working. What the construction crew did not have, and information which the Master Tickets did not contain on May 4, were the results of the unsatisfactory inspection and the additional work which needed to be done. Tr. 398-99, 401. On May 4, that information could be found only on O'Brien's work copies.

2. Attached to the Interoffice Memorandum in which the construction crew requested the termination tickets, and on which Gignon acknowledged that he was returning the tickets, were O'Brien's work copies, not the Master Tickets. Rx4. Gignon's explanation that Rx4 included O'Brien's work copies as an attachment to the memorandum because the Master Ticket is a "permanent plant document" is not credible. Tr. 380-81. Both the interoffice memorandum and the attached worksheets in evidence are copies of original documents, and there is no

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sufficient reason proffered in this record explaining why a copy of the Master Ticket was not attached to the exhibit if that was, in fact, what Gignon had returned to construction.

3. On May 4, O'Brien made a contemporaneous notation on his work copy of the termination ticket that it was being returned to construction. Rx4.

c. Documenting Unsatisfactory Conditions as Satisfactory

Stone & Webster quality assurance procedures require that all unsatisfactory conditions be written up as unsatisfactory even when they are immediately corrected by the craftsmen in the field. Tr. 163-64, 223, 242-42, 383-84, 398-99. O'Brien acknowledged that he misunderstood this requirement and had filed "satisfactory" reports under circumstances in which unsatisfactory conditions were immediately corrected by the workmen. Tr. 69. O'Brien further noted that his fellow inspectors shared his misunderstanding. Tr. 69, *See also*, Tr. 134.

Pursuant to discussions at the meeting on May 11, 1984, with Inspector Graham, Stone & Webster formulated an Action Plan. Cx6, Tr. 131. Paragraph 2 of the Action Plan provided:

> FQC (Field Quality Control) will provide additional training for inspection personnel. This training will re-emphasize the use of IR's (Inspection Reports), especially unsats (unsatisfactory conditions) corrected immediately, and how to correctly fill out the IR form for both sat and unsat conditions. Training will be completed by 5/25/84. Cx6.

On or about May 25, 1984, Stone & Webster prepared an Action Plan Summary confirming that electrical inspection personnel, including O'Brien, had received the training described above. Cx5; Tr. 131, 368. Mr. Terry testified that once the correct method of writing up unsatisfactory conditions immediately corrected was conveyed to O'Brien, O'Brien agreed to follow the correct procedure in future inspections. Tr. 134.

18. During the month of May, 1984, O'Brien received admonitions from co-workers who perceived a threat to O'Brien. Although these co-workers could not recall their comments at the hearing, it must be recognized that a failure to recall is not a denial of an event or a comment. Tr. 56-57, 262-63; 44, 233. For

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example, one witness could deny that he ever told O'Brien to "watch out, that they are going after him." Tr. 265. He could not recall, however, whether he told O'Brien: "Watch yourself, Stone & Webster is going to come down hard on you." Tr. 263, 266.

19. It is not customary at Nine Mile II to fire inspectors who make mistakes of the type made by O'Brien. When supervisors learn that an inspector may be erroneously performing inspections, the inspector may be watched more closely and advised of the correct procedure or interpretation of the relevant Quality Standard. Tr. 250-51. In some instances, retraining is approved as in the case of inspectors who had written up as satisfactory the dissimilar metals connection O'Brien had questioned. Tr. 433-36, *See also*, Cx5,6. Indeed, George Gignon initially thought O'Brien would be treated in this manner. Thus, he testified that on May 31, "they called him [O'Brien] in the office and said he would be in the office until they re-evaluated him to see if any more initial training was needed [sic] whether they would send him back in the field." Tr. 375.

20. On June 8, 1984, O'Brien transmitted a complaint to the Department of Labor alleging discrimination based upon harassment, intimidation, and a reduction in his work hours by Stone & webster and Niagara Mohawk in violation of the Energy Re-organization Act. On June 14, 1984, O'Brien was, in effect, fired by Stone & Wesbter. He has been unable to obtain any employment in the industry since his discharge. Tr.62-63, 70-71.

Discussion

Section 210 of the Energy Reorganization Act provides, in part, as follows:

> (a) No employer, including a Commission licensee, an applicant for a Commission License, or a contractor or a subcontractor of a Commission licensee or applicant, may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee...
> (1) commenced, caused to be commenced,... a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or, a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

> (2) testified or is about to testify in any such proceeding or;
> (3) assisted or participated... in any manner in such in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954; as amended. 42 U.S.C. § 5851.

It has been held that a discrimination claim under the Act must include proof:

(1) that the party charged with discrimination is an employer subject to the Act;

(2) that the complaining employee was discharged or otherwise discriminated against with respect to his compensation, terms, conditions, or privileges of employment; and

(3) that the alleged discrimination arose because the employee participated in an NRC proceeding ....

DeFord v. Secretary of Labor, 700 F.2d 281, 286 (6th Cir. 1983). *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1162 (9th Cir. 1984).

I.

As a contractor of the NRC licensee at Nine Mile II, Stone & Webster is an employer covered by the anti-discrimination proscriptions of the Act. *Mackowiak, supra* at 1162. Similarly, william O'Brien, although technically employed by Butler Services, was an employee of Stone & Webster within the meaning of the Act.

The record shows that Stone & Webster, under contract with Butler Services, hires job shoppers to fill its labor needs during periods of increased demand. Job shoppers work alongside Respondent's permanent employees, and receive their work assignments, direction, control, and supervision in the same manner as Respondent's regular employees. As a result, job shoppers share with regular employees equivalent, and in some instances, unique access to the type of safety-related information

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which the NRC seeks to obtain, and the disclosure of which the Act clearly intends to promote.

Thus, the record shows that job shoppers, serving as inspectors at Nine Mile II, perform an important function in the implementation of Stone & Webster's quality assurance program, and may be, consistent with the policy of encouraging maximum NRC oversight of nuclear power plant construction activity, be defined as "employees" under the Act. *Accord, Royce v. Bechtel Power Corp.*, 83 ERA 3 (ALJ Decision March 24, 1983). A contrary result, as noted in *Royce*, would provide an incentive to replace covered workers with unprotected job shoppers thereby reducing the risk of unwelcome "whistleblowing." Consequently, although Section 5851 does not define the term "employee", a broad interpretation, which includes job shoppers within the protected category of covered workers, seems compatible with the legislative history of the Act, the overall statutory framework, and the actual manner in which job shoppers are used at Nine Mile II.

II.

A prima facie case of discrimination may be established upon the demonstration of a sequence or pattern of suspicious circumstances from which it may reasonably be inferred that adverse action was taken in retaliation for a complainant's contact with the NRC or intracorporate complaints. *Mackowiak, supra* at 1162; *See also, Consolidated Edison Co. of N.Y. v. Donovan*, 673 F. d 61,63 (2nd Cir. 1982). *But see, Brown & Root, Inc. v. Donovan*, 747 F.2d 1029 (5th Cir. 1984). Moreover, the presence or absence of a retaliatory motive is "provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive." *Ellis Fishel*

State Cancer Hospital v. Marshall, 629 F.2d 563, 566 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040, 101 S.Ct. 1757, 68 L.Ed. 2d 237 (1981). *Mackowiak, supra* at 1162.

Although O'Brien was employed by Stone & Webster for only three months, no one seemed dissatisfied with his job performance, expertise, or effort in the first five weeks of his brief tenure. His lead inspector was able to train him quickly and recommend him for certification as a Level II Inspector. Shortly thereafter, his supervisors were sufficiently satisfied with his work to assign him overtime duties as a field inspector along with the task of training new inspectors. Beginning on

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April 27, 1984, however, the day O'Brien complained about the use of dissimilar metals on an electrical installation by L.K. Comstock, his fortunes at Stone & Webster turned distinctly unfavorable.

Following a disagreement between O'Brien and the Electrical Field Engineer concerning the use of dissimilar metals, O'Brien's supervisor requested a meeting with the engineer's supervisor. Although the meeting was initially requested to discuss a "communications problem" between the Engineering and Quality and Control departments, it quickly escalated up the chain of command.

By the time the meeting took place on May 3, 1984, Stone & Webster electrical engineers knew that O'Brien had correctly identified a, serious problem involving the use of dissimilar metals. Yet, a heated meeting ensued, chaired by Thomas Landry the Principal Electrical Engineer at Nine Mile II. While a portion of the meeting was concerned generally with resolving intradepartmental communications problems, the record indicates that it also served to provide an opportunity for Landry to confront O'Brien.

While Landry denies any attempt to intimidate O'Brien, the record shows that the subject matter of O'Brien's credentials was raised. One of the participants other than O'Brien could recall, at least, a rhetorical inquiry by Landry concerning whether O'Brien was a certified inspector. Beyond that, the precise details of the confrontation are unclear. Nevertheless, considering the tone of the meeting, generally viewed as heated with some shouting, the fact that Landry did raise the subject matter of O'Brien's credentials, and the further fact that Stone & Webster led the Resident NRC Inspector to believe, contrary to the facts, that Landry had been reprimanded as a result of this meeting, I believe O'Brien's account of what took place at this meeting is credible. The meeting on May 3 served at least, in part, as a vehicle through which the Principal Electrical Engineer attempted to intimidate and threaten O'Brien for pursuing his challenge to the use of dissimilar metals.[5]

On May 10, 1984, O'Brien filed a complaint with the NRC in which he disclosed the use of dissimilar metals and alleged that he had been harassed by Landry for raising the problem. The

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next day, O'Brien received a reprimand from his supervisor, Jim Beverage, who, acting on a complaint from L.K. Comstock, admonished O'Brien for allegedly failing to inspect a transformer installation the day before.[6] This reprimand was issued before O'Brien had an opportunity to respond, and it had to be withdrawn when O'Brien's lead inspector advised Beverage that O'Brien was not assigned to inspect the installation of the transformer.

Between May 11, and May 31, 1984, Stone & Webster personnel met several times with the NRC's Senior Resident Inspector. Under the umbrella of a promised investigation into the allegations set forth in O'Brien's complaint, Stone & Webster investigated "leads" which would later serve, in part, as justification for O'Brien's dismissal.

On May 31, 1984, following a complaint by L.K. Comstock that O'Brien had left the site of a cable termination, O'Brien was assigned to an office job at reduced work hours and reduced pay. on June 8, 1984, he transmitted a complaint alleging discrimination to the U.S. Department of Labor. Four days later, his supervisor, Donald Hall, reported that O'Brien had failed to write an Inspection Report involving an unsatisfactory cable termination which had taken place on May 4, 1984. Two days later, on June 14, 1984, the Superintendent of Field Quality Control recommended O'Brien's recall, and the next day he was terminated.

Thus it must be noted that the intimidating meeting with Landry, the Beverage reprimand, the investigation of O'Brien, and his termination followed in rapid succession once O'Brien challenged the use of dissimilar metals and participated in the NRC inquiry. The timing of the adverse actions, in escalating severity as O'Brien continued to pursue protected activities, is sufficient to establish a pattern of retaliatory action, and a prima facie case of discrimination in violation of the Act with respect to his reassignment and termination. *Compare, Consolidated Edison, supra* at 63; *Mackowiak, supra*, at 1161, *Ellis Fishel State Cancer Hospital, supra*, at 565; *Deford v. Tennessee Valley Authority*, 81 ERA 1, (ALJ Dec. Jan. 7, 1981), *revd. on other grounds*, 83 ERA 1, Dec. of the Secretary (March 4, 1981). *revd. and remanded, DeFord v. Secretary of Labor*, 700 F.2d 281, (6th Cir. 1983).

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III.

In *Dartey v. Zack Company of Chicago*, 82 ERA 2 (April 25, 1983), the Secretary of Labor set forth a guideline for the consideration of evidence presented by the employer in defense of a prima facie showing of discrimination by the employee. The employer, under *Dartey*, has the burden of producing evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. *See also, Hedden v. Cornam Inspection*, 82 ERA 3 (Decision of the Secretary, June 30, 1982). If the reasons advanced are not pretexts, the trier of fact must consider whether the employer was motivated by both prohibited and legitimate reasons for initiating the adverse action. Under circumstances in which dual motives are found, the employer has the burden of proof to show by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. *Dartey, supra* at 7-9. The *Dartey* decision thus adopted the rule previously applied in an ERA case by the Second Circuit Court of Appeals in *Consolidated Edison*, and, subsequently, adopted in *Mackowiak* by the Ninth Circuit Court of Appeals.[7]

A.

As previously noted, Stone & Webster proffered three reasons for discharging O'Brien. First, O'Brien left the site of a cable termination which Stone & Webster contends he should have witnessed 100%. Second, O'Brien failed to document unsatisfactory conditions, and third, he documented conditions as satisfactory when they were actually unsatisfactory conditions which the craftsmen immediately corrected.

In its post hearing brief, Stone & Webster argues that these circumstances justified O'Brien's reassignment and subsequent termination, and that these breaches of established Quality Standards would have resulted in the same adverse actions even in the absence of the protected conduct. In addition, the employer contends that O'Brien is not entitled to the protections of the Act, because he deliberately caused a violation of the Atomic Energy Act when he knowingly violated the Employer's quality assurance program.

While the alleged justifications advanced by Stone & Webster would seem, on the surface, to provide adequate reasons for the

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adverse actions here taken, upon closer review, it is apparent that respondent has failed to establish by a preponderance of the evidence, that, in this instance, O'Brien would have been dismissed for any or all of alleged reasons in the absence of the protected activity.

1.
<u>100% Witnessing</u>

Stone & Webster interprets its Quality Assurance Standards as requiring its inspectors to provide 100% witnessing of QA Category I cable terminations. O'Brien contends that he witnessed all mandatory "hold points" set forth in the standards, but he concedes that

he did not interpret the standards as requiring 100% witnessing of the entire cable preparation and termination process from start to finish. He. acknowledges that he had left the site of terminations, on occasion, but did not fail to witness any hold points.

On March 2, 1984, prior to O'Brien's arrival at Nine Mile II, Stone & Webster revised its Quality Standards to require witnessing of certain QA Category I cable terminations. Although the revised standard does not specifically state that 100% witnessing is required, it does specify that the "process" of termination shall be witnessed.

Stone & Webster's interpretation that this standard requires 100% start-to-finish witnessing by an inspector, while not entirely devoid of ambiguity, is certainly consistent the language of the standard. Moreover, the purpose of this proceeding is not to second-guess the Contractor regarding the meaning of its own quality assurance standards. It is thus here accepted that Stone & Webster intended to require its inspectors to witness 100% of QA Category I cable terminations. Moreover, there can be little doubt that Stone & Webster would, absent extenuating circumstances, be justified in terminating an inspector who failed to comply with its interpretation of the Quality Control Procedures.

Yet, while Stone & Webster may have intended to require its inspectors to provide 100% witnessing of the entire termination process for QA Category I cables, the record reveals rather sporadic communication of this interpretation to the workforce.

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As a consequence, O'Brien shared with others the misunderstanding that only mandatory hold points, such as those involving heat shrinks and tapping which covered over the work on the cable, had to be witnessed. He shared with others the misunderstanding that non-hold point portions of the termination process could be verified if not actually witnessed. Indeed, two lead inspectors, Gignon and LaPoint, testified that some portions of the cable termination process could be verified if not witnessed,[8] or that work had been verified that had not actually been witnessed.[9]

Furthermore, O'Brien's misunderstanding was reinforced by his own experience to the extent he had been assigned to inspect multiple QA Category I cable terminations simultaneously. These terminations were taking place in different cubicles, eight to ten feet apart, and O'Brien contends that it would have been impossible to provide 100% witnessing of both processes, if the witnessing requirement were interpreted as Stone & Webster requires.

The impossibility of the assignment notwithstanding, however, it is clear that the assignment was highly unusual. Lead Inspector LaPoint, for example, had never been assigned to inspect multiple terminations simultaneously,[10] and Inspection Supervisor Beverage was unaware that any inspectors had been assigned multiple terminations.

The foregoing circumstances might lead a reasonable inspector into the mistaken belief that 100% witnessing was not what the Quality Standards required. Moreover, as will be more fully addressed in a moment, Stone & Webster did not customarily fire inspectors for their failures fully to understand Stone & Webster's interpretation of its complex and frequently revised quality control procedures.[11]

2.

Documenting Unsatisfactory Conditions As Satisfactory

Stone & Webster requires its inspectors to report unsatisfactory conditions even when they are immediately remedied by the craftsmen. O'Brien acknowledged that he had failed to

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report such unsatisfactory conditions when they were corrected immediately. Absent extenuating circumstances, Stone & Webster would be justified in dismissing an inspector who disregarded its reporting procedure in this matter.

The record shows, however, that in the latter part of May, 1984, virtually all of Stone & Webster's electrical inspection personnel were retrained with regard to procedures for writing up unsatisfactory conditions corrected immediately. This, indeed, was the customary manner in which problems of procedural interpretation were handled at Nine Mile II. O'Brien took part in this training, and the Project Quality Assurance Manager seemed satisfied that O'Brien would employ the correct procedure in the future. Moreover, there is no evidence in this record that O'Brien failed to comply with this requirements after he was advised of the correct procedure.

Having retrained virtually the entire electrical inspection workforce in the proper method of reporting these types of situations, it seems rather inexplicable to single out O'Brien for dismissal based upon errors he may have made prior to retraining. Under such circumstances, it would be difficult not to conclude that this alleged justification was a fairly transparent pretext for the dismissal.

3.

Failure to Document Unsatisfactory Conditions

On May 4, 1984, O'Brien conducted an inspection of a QA Category I cable termination. He noted several unsatisfactory conditions on his work copy of the termination ticket he had with him at the job site, but he failed to fill out a formal inspection report of the unsatisfactory conditions as required by Stone & Webster Quality Assurance procedures. Stone & Webster would, absent extenuating circumstances, be justified in terminating an inspector who failed to document unsatisfactory conditions on an inspection report.

Having carefully considered the evidence relating to this incident, however, I have concluded that O'Brien's supervisor took away his work copy of the unsatisfactory inspection results. O'Brien was, therefore, unable to prepare the inspection report. Moreover, the contention that the inspector has a

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duty under all circumstances to prepare an inspection report, ignores the equally compelling and practical fact that the employee is obliged to comply with his supervisor's instructions. In this instance, O'Brien's supervisor, in taking O'Brien's work copy, advised O'Brien that he would take care of the matter. He assigned O'Brien to other duties. Under such circumstances, to dismiss him for failing to complete the report is, I believe, a pretext.

B.

Although two of the alleged reasons for reassigning and dismissing O'Brien constitute a pretext for the adverse actions, one reason, that of leaving the site of a QA Category I termination, is sufficiently close to warrant further discussion of a "dual motive" for the discharge. Again, it should be noted that under *Dartey* and *Consolidated Edison*, the employer must show by a preponderance of the evidence that it would have reached the same decision regarding the employee even in the absence of the protected conduct. At this stage of the proceeding, evidence of Respondent's treatment of other workers who may have misunderstood or misapplied Respondent's quality control standards would be relevant. *See, e.g., Pensyl v. Catalytic Inc.*, 83 ERA 2 at 9, (Decision of the Secretary, January 13, 1984); *Consolidated Edison, supra* at 63; *Mackowiak supra* at 1162.[12]

The record demonstrates that O'Brien was indeed penalized in an uncommonly aggressive fashion as a consequence of his misinterpretation of the 100% witness standard. There is, for example, no evidence that Gignon, who verified rather than witnessed a portion of the termination process on May 31, or assigned multiple, simultaneous terminations, which may have been incompatible with the 100% witness rule, was admonished in any way. Conversely, there is evidence that none of the inspectors, who passed as satisfactory the dissimilar metals connections which O'Brien challenged, were decertified or dismissed. The dissimilar metals issue was classified as a serious problem, but the inspectors involved were retrained. Similarly, the electrical inspection personnel were retrained in respect to completing inspection reports and documenting unsatisfactory conditions immediately corrected. None but O'Brien were discharged. And in the field, it is not uncommon for lead inspectors to detect mistakes made by a subordinate inspector. The errors are noted,

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and the inspector may be monitored more closely for awhile and advised of the correct procedures and interpretations of the quality standards. Some are retrained.

I do not minimize the importance with which Stone & Webster regards its 100% witness rule in observing that the adverse action against O'Brien is uncharacteristic of its handling of similar situations. There was ample justification for O'Brien's misinterpetation of the rule, and the employee never attempted to cover up his error. The evidence further shows he was not alone in misunderstanding the scope and application of the rule. Yet, considering the instances of failure by inspectors revealed in this record, he alone was dismissed. I am, under the circumstances, compelled to conclude that "but for" his protected activity, William O'Brien would not have been fired.

Now Stone & Webster, having received information that Complainant had left the site of QA Category I cable termination on May 31, 1984, was, I believe, justified in reassigning him pending the outcome of a reasonable inquiry into the circumstances of his absence. The record shows, however, that Respondent had, by June 5, 1984, completed its inquiry. It knew, by that date) that complainant had misinterpreted its 100% witnessing rule, but it was also aware that he had not violated any "hold points, and that he had been assigned multiple cable terminations simultaneously.[13] Moreover, as this record demonstrates, Stone & Webster's rule was not uniformly intepreted by its workers in the field. Beyond June 5, 1984, continuation of the reassignment was unjustified.

C.

Respondent contends that Complainant is not entitled to the protections afforded by the ERA, because he deliberately violated the Atomic Energy Act when he knowingly violated Stone & Webster Quality Assurance procedures. The trier of fact has combed the record for evidence tending to support these assertions.

Considered as a whole, the record is barron of an indication that O'Brien knowingly violated any safety procedure. His failures resulted from confusion in the interpretation of a complex set of standards, not because he deliberately took actions or withheld actions which he knew were contrary to

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established methods of inspection. The contention that he should be denied protection under the ERA because he deliberately violated the Atomic Energy Act is without merit.[14]

Conclusion

For all of the foregoing reasons, I conclude that the reassignment of O'Brien beyond June 5, 1984, and his subsequent dismissal were acts of discrimination in retaliation for O'Brien's NRC contacts and were in violation of 42 U.S.C. § 5851.

IV.
Relief

Complainant requests immediate reinstatement to his former position with Stone & Webster at Nine Mile II; reimbursement for the loss of overtime wages and demotion from June 1, 1984, to June 15, 1984; reimbursement for lost wages from June 16, 1984, to the date of reinstatement; litigation costs totalling $5,000; and attorney's fees of $21,000.

Once discrimination is found that is prohibited by the Act, Section 5851(b)(2)(B) requires reinstatement of the Complainant with compensation including back pay, and restoration of the terms and conditions of his employment. *Deford, supra*. An order requiring the reinstatement of Complainant as a Level II, Electrical Termination, Quality Control Nuclear Inspector at a pay rate of $17.00 per hour, will, therefore, be recommended to the Secretary.

Complainant also seeks compensation for the loss of overtime wages from June 1 to June 15, 1984. For the period June 1 to June 5, the request for relief should be denied. For the period June 6, 1984, to June 15, 1984, it will, in accordance with the foregoing discussion, be recommended that Complainant's compensation include lost overtime wages.

The amount of overtime Complainant likely would have worked may, I believe, be reasonably calculated based upon an average of the number of hours he worked during the pay periods beginning on March 18, 1984, and ending on June 3, 1984. The records show that complainant worked an average of 53.75 hours during the 12-week period preceeding the pay period ending on June 3,

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1984, or 13.75 hours of overtime each week.[15] Overtime shall be compensated at 1 1/2 times the base pay rate 6r $25.50 per overtime hour. Tr. 70.The record also shows that Complainant frequently worked a six-day week. Consequently, for the 4-day period June 6, 1984, through June 9, 1984, it shall be recommended that he be accorded credit for 9.2 hours of overtime, representing 2/3 of his average weekly overtime, and awarded $234.60 for this period. For the pay period ending June 17, 1984, he should be accorded credit for 1.5 hours of regular time, 13.75 hours of overtime, and thus be awarded $376.13.

Commencing on Monday, June 18, 1984, and continuing until the date of reinstatement, Complainant should receive a back pay award for 40 hours of regular time and 13.75 hours of overtime for each workweek during this period. In summary, Complainant's award for the period June 18, 1984, to date and continuing until the date of reinstatement should be ,030.63 per week.

Complainant further seeks reimbursement in the amount of $5,000.00 representing litigation costs and $21,000 in attorney's fees. Costs of this type are recoverable by successful complainants in an ERA proceeding. *DeFord, supra*, at 288-89. The Secretary may determine, however, whether such costs are "reasonably incurred," and has, pursuant to this responsibility, required counsel to document costs and fees. *DeFord v. TVA*, 81ERA1, (Decisions of the Secretary June 30, 1982 and April 30, 1984). Since no documentation of fees or costs has been submitted in this matter, an assessment of reasonableness cannot be made. It will, therefore, be recommended that the request for fees and costs be denied without prejudice.

Counsel should be afforded an opportunity to submit documentation of the litigation costs and to refile an application for fees, together with supporting data, including among other things, his professional qualifications, an itemization of the hours expended on complainant's behalf in this case, and his normal hourly billing rate. *DeFord, supra*, (Decision of the Secretary, June 30, 1982).

Accordingly, it is recommended that the Secretary of Labor issue the following Order:

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ORDER

IT IS ORDERED that Stone & Webster Engineering Corporation:

1. Forthwith reinstate William O'Brien to his former position as a certified Level II, Electrical Termination, Quality Control Nuclear Inspector at the Nine Mile Point Nuclear Power Plant, Unit II.

2. Pay to William O'Brien the sum of $610.73 for loss of wages for the period commencing June 6, 1984, and ending on June 17, 1984;

3. Pay to William O'Brien the sum of ,030.63 per week commencing on June 18, 1984, to date and continuing until the date of reinstatement.

IT IS FURTHER ORDERED that Complainant's request for fees totalling $21,000.00 and costs amounting to $5,000.00 be, and it hereby is, DENIED without prejudice.

STUART A. LEVIN
Administrative Law Judge Date Issued: FEB 28 1985
Washington, D.C.

SAL/mlc

[ENDNOTES]

[1] At the hearing, O'Brien alleged that his dismissal was part and parcel of the discrimination timely alleged in the complaint. This allegation was treated as an amendment to his complaint, and the issue of his dismissal was full and fairly litigated by both parties to this proceeding.

[2] The parties in this proceeding have agreed to waive the requirement in 42 U.S.C. § 5851 (b)(2)(A) and 29 CFR § 24.6(b)(1) that the initial decision be issued in 20 days and that the Secretary of Labor issue a final order within 90 days after receipt of a complaint. Tr.5.

[3] The status of Stone & Webster's investigation of the alleged falsification of an installation test report by L.K. Comstock personnel is not clear on this record. Tr. 209-210.

[4] Respondent's exhibit submitted post hearing consisting of the E&DCR FO 1424, is admitted into evidence as Rx7.

[5] It must be emphasized here that the meeting on May 3, 1984, is relevant only to the extent that it reveals a pattern of conduct by Stone & Webster responsive to O'Brien's complaints. *Mackowiak, supra*. To the extent O'Brien's complaint charging intimidation as a consequence of the May 3, meeting alleges a violation of the Act, however, it is barred by the 30 day time limit for the filing of a complaint. Since his complaint was mailed on June 8, 1984, nothing occurring on or before May 8, can be sustained in this proceeding as a separate violation of the ERA. 29 CFR § 24.3(b).

[6] Although Beverage denies that he issued a reprimand on this occasion, I find more credible O'Brien's account that a reprimand did issue although whether it was in writing or conveyed orally is unclear. O'Brien's contemporaneous comment to Donald Hall, a supervisor, that Beverage had "chewed him out," is persuasive in this regard, and the only other witness to the incident, Gignon, could not recall whether or not O'Brien was reprimanded.

[7] The Sixth Circuit, in contrast, has suggested that a discharge motivated, in part, by an employee's protected activity may be in violation of the Act. *See, DeFord v. Secretary of Labor, supra*, at 287.

[8] The suggestion that LaPoint's testimony was not related to QA Category I terminations is not persuasive. His responses were provided in the context of explaining the inspection procedure on QA Category I cable, Tr.237-38, and emphasized E061A Section I procedures including mandatory hold points applicable to such terminations. Tr. 239-40.

[9] Gignon, Tr. 376-77. It should be noted here that LaPoint participated in the Hall Survey, Gignon did not. The inconsistencies between the Hall Survey results and the testimony received at the hearing, tends to emphasize the confusion which prevailed regarding the meaning of the 100% witnessing rule. *Compare eg*. Tr. 239-40, 244 with Tr. 361.

[10] Tr. 245

[11] Viewing this incident strictly as a personnel, rather than a safety matter, it must be noted that O'Brien "checked out" when he left the site on May 31, making no effort to cover-up his absence, that other inspectors had left job sites after checking out with the craftsmen, and that O'Brien freely acknowledged his misunderstanding of the 100% witnessing requirement.

[12] The absence of disparate treatment does not necessarily establish the absence of discrimination. *See, DeFord, supra*, at 286. Conversely, however, the presence of disparate treatment may be an important manifestation of the discriminatory conduct.

[13] CX2

[14] The ERA protections were not enacted to shield only those participants in NRC proceedings who have never committed errors on the job. The "dual motive" inquiry, mandated by the Secretary of Labor and the courts, allows for the protection of the imperfect employee by requiring a determination that the non-protected activity, alone, would justify the adverse action. Consequently, those who cooperate with the NRC need not be flawless, and they may not be subjected to discrimination or treated more harshly for their mistakes than similarly situated employees who exhibit the same or substantially similar shortcomings.

[15] CX1